IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

IN RE:	)	
	)	**Case No. 11-5736-TBB-9**
JEFFERSON COUNTY, ALABAMA,	)	
a political subdivision of the State of	)	
Alabama,	)	**Chapter 9 Proceeding**
	)	
Debtor.	)	
	)	

EMERGENCY MOTION OF SYNCORA GUARANTEE INC. FOR ADEQUATE PROTECTION OR, IN THE ALTERNATIVE, RELIEF FROM THE AUTOMATIC STAY

Syncora Guarantee Inc. ("Syncora"), a creditor and party-in-interest, hereby files this Emergency Motion (the "Motion") for entry of an order, substantially in the form of the proposed order attached hereto as Exhibit A, (i) authorizing and directing Jefferson County, Alabama, a political subdivision of the State of Alabama (the "Debtor" or the "County"), as a form of adequate protection, (a) to transfer a sufficient sum of System Revenues to the Indenture Trustee for the purpose of maintaining current Debt Service Payments on the Warrants (as each term is defined below) and (b) to provide access and rights of inspection to the Debtor's books and records to ensure that all System Revenues (as defined below) are properly accounted for pending further order of the Court, or, in the alternative, (ii) granting relief from the automatic stay such that Syncora may pursue appropriate remedies under state law in connection with the County's failure to make current Debt Service Payments to the Indenture Trustee for the benefit of the holders of the Warrants. In support of the Motion, Syncora respectfully states as follows:

I. PRELIMINARY STATEMENT

1. Syncora is a secured party with a protectable interest in the System Revenues. Syncora submits this Motion on an expedited basis in order to remedy a significant harm that it

will principally bear based upon the County's ongoing failure to transfer to the Bank of New York Mellon (the "Indenture Trustee") a sufficient amount of revenues from the County's operation of its sewer system (the "System," and the revenues of the System, the "System Revenues") that would enable the Indenture Trustee to pay regularly scheduled debt service ("Debt Service Payments") to the holders of certain warrants (the "Warrants," and the holders thereof, the "Warrantholders") issued by the County and secured by a pledge of the System Revenues. In the absence of the Debtor remaining current on its Debt Service Payments, the Indenture Trustee will look to the issuers of certain surety policies, primarily Syncora, to provide sufficient funds to cover any anticipated shortfalls. In this respect, the surety policies essentially serve as a backstop to ensure that Warrantholders receive full, regularly scheduled principal and interest payments on the Warrants as and when due for payment under that certain Trust Indenture dated February 1, 1997 (as amended and supplemented, the "Indenture").

2. Since January 6, 2012, when this Court entered an Order restoring the Debtor as the entity that controls and operates the System, the Debtor has transferred to the Indenture Trustee an amount of System Revenues that is approximately $9 million less in Net Revenues (as defined under the Indenture) than the Debtor is required to transfer under the Indenture.[1] Without any authority from this Court, the Debtor has deducted (or reserved) from System Revenues amounts purportedly attributable to capital expenditures[2] and legal fees[3] that do not

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[1] *See* Order entered initially on January 6, 2012 (as amended and supplemented, the "January Order") regarding the Indenture Trustee's Motion for, *inter alia,* Relief from the Automatic Stay, dated November 11, 2011 (the "Stay Motion") and the Court's Memorandum Opinion with respect to the January Order (as initially entered on January 6, 2012, and as amended, the "Memorandum Opinion").

[2] The Indenture permitted the Debtor to deduct expenditures related to maintaining the System in good working repair and operating conditions. These permitted expenditures do not include expenses that are properly chargeable to a fixed capital account. It is these latter expenditures, both present and future, for which the Debtor has established a reserve.

otherwise constitute "Operating Expenses" as such term is defined under the Indenture. Rather than complying with its Indenture obligations until it obtains appropriate relief from this Court as to the extent and nature of System Revenues that it may retain, the Debtor has unilaterally determined that such extraordinary items constitute "necessary operating expenses" as such term is used in section 928(b) of title 11 of the United States Code (the "Bankruptcy Code"). The Debtor's actions have real and significant consequences for Syncora (as well as the other two bond insurers that have issued surety policies).

3. The Indenture Trustee has informed Syncora that, as a result of the Debtor's failure, in the post-petition period, to transfer to it the amount of System Revenues necessary to pay the County's Debt Service Payments under the Indenture, the Indenture Trustee will have a shortfall in funds available to pay regularly scheduled Debt Service Payments in the amount of several million dollars beginning as early as February 15, 2012, or two days after the filing of this Motion. The Indenture Trustee further anticipates that there will be periodic shortfalls on certain further regularly scheduled principal and interest payments throughout the remainder of February and into early March 2012.

4. Moreover, the Indenture Trustee expects additional shortfalls in the millions of dollars to occur thereafter if the Debtor maintains its current practices and procedures for transferring System Revenues to the Indenture Trustee. Indeed, such deficiencies are likely to continue to occur at least until this Court determines whether the Debtor may deduct only the Operating Expenses that the Debtor, Indenture Trustee, Syncora and other insurers (collectively, the "Bond Insurers"), and certain Warrantholders (together, the "Parties") agreed upon under the

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[3] The reserve for legal fees includes fees that would not be considered Operating Expenses under the Indenture but rather includes legal fees in connection with the administration of the chapter 9 case.

Indenture or whether the Debtor may deduct additional items (*e.g.*, capital expenditures, depreciation and legal fees) along with such Operating Expenses.[4]

5. The Debtor's shortfalls in Debt Service Payments will be borne not by the Warrantholders as a whole but by Syncora and the other Bond Insurers.[5] To be plain, these shortfalls are not the result of inadequate revenue streams; instead, they result entirely from the Debtor's unilateral actions in ignoring the plain terms of the Indenture governing the payment and distribution of System Revenues in favor of the Debtor's own interpretation of section 928(b) of the Bankruptcy Code. The Debtor's failure to adequately service the Warrants during the post-petition period has thus prejudiced Syncora's and the other Bond Insurers' interests.

6. Syncora steadfastly sought to avoid burdening the Court with this Motion by participating in numerous discussions with the other Parties right up until the filing of this Motion in an effort to maintain the status quo (*i.e.,* keeping Debt Service Payments current) pending the Operating Expense Hearing and this Court's determination of the "operating expense" issue. These efforts, though ongoing, have yet to yield an interim resolution of the issue. Consequently, Syncora is now confronted with the very real prospect of having to bankroll the bulk of the difference between what the Debtor will pay and what it is otherwise required to pay to maintain current its Debt Service Payments. In addition to the immediate prejudice that it will suffer if it is called upon to backstop the Debtor's payments, Syncora believes that its very viability as a going concern may be threatened because of the heavy burden it must shoulder, *i.e.*, not less than a 77 percent share of the regularly scheduled principal and

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[4] The Court has recently scheduled a hearing to address the section 928(b) "operating expenses" issue on April 4-6, 2012 as a further hearing on the Indenture Trustee's Stay Motion (the "Operating Expense Hearing").

[5] The other Bond Insurers are Assured Guaranty Municipal Corp. ("Assured") and Financial Guaranty Insurance Company ("FGIC"). The Bond Insurers share in any surety draws in the following approximate percentages: Syncora – 77%; Assured – 13%; and FGIC – 10%.

interest payments that the Debtor does not otherwise timely pay.[6] Accordingly, Syncora files this Motion seeking the emergency relief set forth herein.

II. BACKGROUND

7. In 1996, the Debtor entered into a consent decree with the Federal Government that required the County to remediate its sewer system. (*The Bank of New York Mellon, As Indenture Trustee v. Jefferson County, Alabama*, Adv. No. 12-00016 (TBB), Complaint filed February 3, 2012 [Docket No. 1] at ¶ 20) (the "Declaratory Judgment Complaint"). To complete this remediation, the Debtor raised $3.6 billion of capital through the issuance of the Warrants. (*Id.* at ¶¶ 21-22). Pursuant to the Indenture, the Debtor agreed that the Warrants were secured by the revenues generated by the System remaining after payment of Operating Expenses. (*Id.* at ¶ 26; Indenture at § 2.1).

8. In connection with the issuance of the Warrants, the County obtained insurance on the Warrants from, among others, Syncora, to insure against the Debtor's failure to pay principal and interest owed on a significant portion of the Warrants as and when due under the Indenture and other agreements. (*The Bank of New York Mellon v. Jefferson County, Alabama*, CV-08-H-1703-S, Complaint filed September 16, 2008 at ¶ 30 (the "2008 Complaint")).

9. Syncora is both a Surety and Insurer of Warrants issued by the County. Specifically, Syncora is (i) an insurer of (a) $839,500,000 Sewer Revenue Refunding Warrants Series 2002-C (the "2002 Warrants") pursuant to a Municipal Bond Insurance Policy, effective October 25, 2002 (the "2002 Policy"); and (b) $300,000,000 Sewer Revenue Refunding Warrants Series 2003-B (the "2003 Warrants") pursuant to a Municipal Bond Insurance Policy,

[6] Syncora reserves any and all rights to reimbursement of amounts that may need to be funded under the Syncora Surety (as defined below). This reservation is inclusive of any and all rights that may arise from or relate to the Syncora Surety and/or any other agreements that Syncora entered into with County. Nothing contained herein shall be construed as a waiver, implicit or explicit, of such rights.

effective May 1, 2003 (the "2003 Policy" and together with the 2002 Policy, the "Insurance Policies") and (ii) a surety of the Warrants, including the 2002 and 2003 Warrants, pursuant to the Debt Service Reserve Insurance Policy, effective December 30, 2004 (the "Syncora Surety").

10. Simultaneously with entering into the Surety, the County and Syncora entered into the Financial Guaranty Agreement, dated as of December 30, 2004 (the "FGA"). The FGA requires the County, among other things, to reimburse and indemnify Syncora for various payments and losses, including payments made under the Surety. Specifically, Section 4.02 of the FGA provides Syncora with broad rights to pursue remedies in connection with the County's obligations to reimburse Syncora for payments made under the Surety. In addition, section 2.03 of the FGA provides that the County grants Syncora a security interest in any collateral, property, revenue, or other payments to the extent it grants any such security interests to the holders of the Warrants under the Indenture on a parity basis, which includes the System Revenue pursuant to Section 2.1 of the Indenture.[7]

11. Under the Indenture, the County was required to deposit all System Revenues into a "Revenue Account" (as such term is used under the Indenture) and, after deducting Operating Expenses,[8] as defined by Section 1.1 of the Indenture, into, *inter alia*, a "Debt Service Fund,"

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[7] In addition, as a result of draws made under the Insurance Policies arising from the County's failure to make required principal and interest payments on the Warrants, Syncora acquired $184 million of the Warrants (the "Replacement Warrants") from certain liquidity banks. The Replacement Warrants are secured by a lien on the System Revenues after payment of Operating Expenses.

[8] The Indenture defines "Operating Expenses" as:

(a) the reasonable and necessary expenses of efficiently and economically administering and operating the System, including, without limitation, the costs of all items of labor, materials, supplies, equipment (other than equipment chargeable to fixed capital account), premiums on insurance policies and fidelity bonds maintained with respect to the System (including casualty, liability and any other type of insurance), fees for engineers, attorneys and accountants (except where such fees are chargeable to fixed capital account) and all other items, except depreciation, amortization, interest and payments made pursuant to Qualified Swaps, that by generally accepted accounting principles are properly chargeable to expenses of administration and operation and are not characterized as extraordinary items, (b) the

and a "Reserve Fund" (as each such term is used in the Indenture). (Indenture at §§ 11.1, 11.2, 11.3). As the name connotes, the Debt Service Fund is used by the Indenture Trustee to pay principal and interest on the Warrants as and when they become due from System Revenues after payment of Operating Expenses. (Indenture at § 11.2). The Reserve Fund, also maintained by the Indenture Trustee, essentially acts as a backstop in the event that sufficient funds are not available in the Debt Service Fund to make principal and interest payments then due on the Warrants. (Indenture at § 11.3).

12. The Indenture further requires that sufficient funds be deposited into the Reserve Fund to cover no less than the average annual debt service on all Warrants (the "Reserve Fund Requirement").[9] Under Section 11.11 of the Indenture, the County may satisfy all or a portion of the Reserve Fund Requirement by the deposit with the Indenture Trustee of, among other things, a surety bond or bonds.

13. The Syncora Surety is deposited into the Reserve Fund in order to satisfy a portion of the Reserve Fund Requirement. The maximum amount available under the Syncora Surety is $164 million, of which $27 million had been drawn prior to the filing of the County's chapter 9 case. In addition to the Syncora Surety, surety policies issued by Assured (the "Assured Surety") and FGIC (the "FGIC Surety") are also on deposit in the Reserve Fund. The

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expenses of maintaining the System in good repair and in good operating condition, but not including items that by generally accepted accounting principles are properly chargeable to fixed capital account, and (c) the fees and charges of the Trustee. Payments or other transfers of Sewer Revenues into the General Fund of the County shall constitute payments of Operating Expenses if and to the extent that the services or benefits for which such payments or transfers are made are such that payments to a Person other than the County for such services or benefits would constitute payments of Operating Expenses.

[9] "Reserve Fund Requirement means, as of the date of any determination thereof, the lesser of (a) 125% of the average annual debt service on all Parity Securities at the time outstanding and secured by the Reserve Fund, (b) the maximum annual debt service on all Parity Securities at the time outstanding and secured by the Reserve Fund, or (c) an amount equal to the aggregate of 10% of the original principal amount (or, in the case of any series of Parity Securities sold with original issue discount in an amount greater than 2% of its original principal amount, the issue price) of each series of Parity Securities at the time outstanding and secured by the Reserve Fund." Indenture at § 1.1.

Assured Surety and FGIC Surety are available up to the amounts of $27,300,000 and $20,600,000, respectively. Consequently, the Syncora Surety covers approximately 77% of the Reserve Fund Requirement and the Assured Surety and FGIC Surety cover approximately 13% and 10% of the Reserve Fund Requirement, respectively.[10]

14. Following the County's filing of its chapter 9 petition on November 9, 2011 and entry of the January Order, the County has consistently failed to transfer System Revenues in an amount and manner consistent with the requirements under the Indenture. (*See* Declaratory Judgment Complaint, at ¶¶ 50-54). Rather, the Debtor has deducted capital expenditures, professional expenses, and, *inter alia*, depreciation and amortization expenses on top of the Operating Expenses the Indenture allows it to deduct. (*See id.*).

15. The Debtor has contended that it is not expending such reserved funds but is maintaining them in an escrow account.[11] This treatment, however, does not ameliorate any shortfalls in the Debt Service Payments required under the Indenture or provide any comfort to Syncora. Rather, a continuation of the Debtor's current practice of withholding System Revenues in addition to the Operating Expenses allowed to be deducted pursuant to the Indenture will result in the Indenture Trustee drawing against the Syncora Surety and the Assured Surety. The Indenture Trustee anticipates multi-million dollar shortfalls in funding of Debt Service Payments beginning on February 15, 2012 and continuing thereafter until at least March 2, 2012 based upon the Debtor's turnover of System Revenues to date. Such shortfalls are likely to

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[10] As a result of ongoing financial difficulties, FGIC is currently operating under the auspices of the New York State Department of Insurance, now merged into the New York State Department of Financial Services, under Section 1310 of the New York State Insurance Law. As a result, FGIC is currently unable to honor any draws under FGIC Surety.

[11] Such reserves are unnecessary as they are in addition to a $60 million reserve fund that the Debtor is currently holding that may be available for capital expenditures. The fact that the County may need permission to access these funds does not justify the County's unilateral reservation of funds.

continue to occur if the Debtor maintains its current practices and procedures with respect to the transfer of System Revenues to the Indenture Trustee.

16. The state-court appointed receiver previously estimated that the Debtor's annual receipt of total system revenues is approximately $160 million, or approximately $13.33 million each month, and that the total annual Operating Expenses under the Indenture is approximately $61 million, or approximately $5 million each month. (*See* Letter of David Stern, counsel for the County, to Gerald Mace, counsel for the Indenture Trustee, dated as of January 20, 2012, attached hereto as Exhibit B).[12] In addition, the Indenture Trustee has informed Syncora that Debt Service Payments average approximately $6.5 million on a monthly basis. Thus, after deducting Operating Expenses and making regularly scheduled Debt Service Payments, each in an amount consistent with their monthly averages, there is approximately $1.5 million of excess funds each month pending this Court's determination of the necessary operating expenses following the Operating Expense Hearing. These excess funds, which constitute Net Revenues (as defined in the Indenture), would otherwise be transferred to and held by the Indenture Trustee in accordance with the terms of the Indenture.

III. EXPEDITED RELIEF REQUESTED

17. Syncora requests the entry of an Order, substantially in the form of the Order attached hereto as Exhibit A, authorizing and directing the Debtor to provide adequate protection in the form of (i) the County's timely payment[13] of sufficient System Revenues to the Indenture

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[12] The monthly revenues for January 2012 should have exceeded the monthly average because the County received most of the proceeds of the Sewer Tax (see Section 11.1 of the Indenture), approximately $5 million, during that month.

[13] Under the Indenture, the County is required to transfer System Revenues, net of Operating Expenses, to the Indenture Trustee on or before the last business day of each calendar month for payment of Parity Securities (as defined in the Indenture) that becomes due and payable. (*See* Indenture §§ 11.1, 11.2).

Trustee in order that the Indenture Trustee may continue to make regularly scheduled Debt Service Payments to the Warrantholders, without drawing on the Syncora Surety or any other Surety in the Reserve Fund, until this Court has ruled on this issue following the Operating Expense Hearing and (ii) full access to, and inspection of, the Debtor's books and records to ensure that all System Revenues are properly accounted for pending further order of the Court. In the alternative, Syncora requests relief from the automatic stay in order to pursue appropriate remedies against the Debtor in state court in connection with the Debtor's failure to satisfy its obligations pursuant to the Indenture.

18. Syncora submits that the foregoing relief is necessary on an expedited basis so that Syncora is not prejudiced by the Debtor's unilateral actions with respect to the treatment of System Revenues and Operating Expenses pending this Court's determination of the issues. Expedited consideration of this Motion "is contemplated by 11 U.S.C. § 362(f), which authorizes the Court to grant stay relief with or without a hearing 'if necessary to prevent irreparable damage to the interest of an entity in property . . . . " *In re Parten*, No. 07-10255-JDW, 2007 WL 788883, at *2 (Bankr. M.D. Ga. Mar. 13, 2007); *see also Gen. Elec. Credit Corp. v. Montgomery Mall Ltd. P'ship (In re Montgomery Mall Ltd. P'ship)*, 704 F.2d 1173, 1175-76 (10th Cir. 1983), *cert denied, Montgomery Mall Ltd. P'ship v. Gen. Elec. Credit Corp.*, 464 U.S. 830 (1983) (affirming bankruptcy court decision to conduct a hearing on a motion for emergency relief on one day's notice and noting that relief under 11 U.S.C. § 362(f) was appropriate where irreparable injury to collateral would ensue). As this Court itself noted, "the warrant holders cannot be compensated for a loss caused by a delay in receipt of what they are entitled to under the Indenture." (Memorandum Opinion. at 43 n. 16). Even more than the Warrantholders who will receive current Debt Service Payments in any event, Syncora may not be compensated for

losses derived from such a delay, particularly when its own viability as a going concern may depend on the provision of adequate protection requested herein or relief from the automatic stay.

IV. GROUNDS FOR RELIEF REQUESTED

A. Adequate Protection

1. *Adequate Protection Standard*

19. As an initial matter, "[sections] 361 and 362 of the Bankruptcy Code, which respectively define the concept of adequate protection and its applications, are specifically incorporated into chapter 9 through [section] 901." *In re County of Orange*, 179 B.R. 185, 190 (Bankr. C.D. Cal. 1995) ("Congress obviously incorporated these specific sections into Chapter 9 to have purpose and effect. Because the court has the power to continue the stay in effect, it logically follows that the court must likewise have the power to order adequate protection as a condition for the continuance of the automatic stay"); *see also* 11 U.S.C. § 901(a). These sections afford creditors stayed from enforcing their interests with the *right* to adequate protection. *See* 3-361 COLLIER ON BANKRUPTCY ¶ 361.02 ("An entity is entitled to adequate protection ***as a matter of right, not merely as a matter of discretion*** . . . when the entity is stayed from enforcing its interest. . . .") (citing H.R. Rep. No. 595, 95th Cong., 1st Sess. 340, 343-44 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 52-53 (1978)) (emphasis added).[14] Section 904 of the Bankruptcy Code does not limit the Court's ability to order adequate protection. *In re County of Orange*, 179 B.R. at 190. As the Orange County court noted, by filing the chapter 9 petition,

[14] Moreover, section 922 of the Bankruptcy Code expressly contemplates that the Debtor may provide adequate protection of a creditor's interest in property. *See* 11 U.S.C. § 922(c) ("If the Debtor provides, under sections 362, 364 and 922 of this title, *adequate protection* of an interest of the holder of a claim secured by a lien on property of the debtor . . .") (emphasis added).

"the County has consented to this court's jurisdiction to order, if necessary, adequate protection in connection with this proceeding." *Id.*

2. *This Court has Broad – and Flexible – Discretion to Determine an Appropriate Form of Adequate Protection*

20. Section 361 of the Bankruptcy Code outlines – in a non-exhaustive fashion – examples of different forms of adequate protection available to interest holders, and provides, in part, that when adequate protection is required under section 362 of the Bankruptcy Code, it may be provided by (i) periodic cash payments, (ii), additional or replacement liens, and (iii) ***such other relief*** as will result in the realization by such entity of the indubitable equivalent of its interest in the debtor's property. *See* 11 U.S.C. § 361 (emphasis added).

21. This Court has considerable flexibility in determining the appropriate form of adequate protection and discretion to make determinations on a case-by-case basis. *See MBank Dallas, N.A. v. O'Connor (In re O'Connor)*, 808 F.2d 1393, 1396-97 (10th Cir. 1987) (adequate protection is a "concept which is to be decided flexibly on the proverbial 'case-by-case' basis"); *In re Briggs Transp. Co.*, 780 F.2d 1339, 1350 (8th Cir. 1985) (noting courts exercise "maximum flexibility in structuring a debtor's proposal for adequate protection" and "what constitutes adequate protection in a particular case is a question whose resolution is best left to the knowledge and expertise of the Bankruptcy Court"); *Bankers Life Ins. Co. v. Alyucan Interstate Corp. (In re Alyucan Interstate Corp.)*, 12 B.R. 803, 813 (Bankr. D. Utah. 1981) ("The facts of each case, thoughtfully weighed, not formularized, define adequate protection."); *cf.* COLLIER ¶ 363.05 (noting examples in section 361 of the Bankruptcy Code of forms of adequate protection "are not intended to be limiting").

3. *Syncora Requests Relief That is Tailored to the Circumstances Before the Court*

22. As this Court has noted with respect to ongoing payment of the Warrants, "the only form of adequate protection that this Court could provide is the uninterrupted receipt of the Net Revenues during the pendency of the chapter 9." (Memorandum Opinion at 43, n. 16). Here, Syncora is only requesting what this Court has already stated would be the only way that Syncora – and other similarly situated parties – could be adequately protected. In particular, Syncora requests that the Court compel the County to comply with the provisions of the Indenture that establish its obligation to service its Warrants on a current basis. Such relief is sought only during the pendency of this Court's determination of whether the Debtor may withhold professional fees, depreciation, amortization, and capital expenditures in addition to the Operating Expenses that the Debtor is otherwise permitted to withhold under the terms of the Indenture.

23. Granting the requested adequate protection merely permits Syncora to receive the benefit of its bargain, *i.e.*, by allowing it to avoid funding shortfalls that do not arise from revenue shortfalls. *See In re Westpoint Stevens, Inc.*, 600 F.3d 231, 258 (2d Cir. 2010) ("The whole purpose of adequate protection for a creditor is to insure that the creditor receives the value for which he bargained prebankruptcy."). Moreover, in granting the relief requested, the Court will ensure that all Parties' interests are preserved and protected while the Debtor's novel expansion of operating expenses is litigated. Indeed, the requested relief protects all of the Parties because it (i) enables the Debtor to hold excess funds net of the Operating Expenses and Debt Service Payments in reserve during the interim period, (ii) allows the Warrantholders to be paid principal and interest on schedule, and (iii) prevents Syncora and the other Bond Insurers from having to bankroll shortfalls arising from a dispute regarding the amount and nature of

operating expenses instead of actual revenue shortfalls.[15] Further, Syncora's request comports with the Court's interpretation of 11 U.S.C. §§ 922 and 928 insofar as its request seeks to protect all Parties and allows each of the Parties to reserve their respective rights while the Debtor continues to service its obligations. (*See* Memorandum Opinion at 42-43, n. 16) ("There are difficulties with just segregating the Net Revenues. One is that the continued flow of pledged special revenues, here the Net Revenues, is what Congress intended by its exclusion of such revenues from the operation of the automatic stays of § 362(a) and § 922(a) . . .").

24. The circumstances of this case establish that the equities and fundamental fairness favor Syncora's request because Syncora is not seeking to avoid liability altogether, but instead to ensure that it only shoulders liability upon the terms of which it agreed, *i.e.*, when the Debtor actually lacks funds sufficient to pay its obligations because of an actual funding shortfall and not, as is presently the case, because of a dispute over the meaning of a term. In addition, the requested relief, *i.e.*, monthly payments that accord with the Parties' pre-petition agreements, is consistent with what courts have previously provided to parties as adequate protection. *See In re County of Orange*, 179 B.R. at 190 (concluding that the Bankruptcy Court had the power to order the County to provide adequate protection as a condition for the continuance of the automatic stay); *cf. In re Mutschler*, 45 B.R. 494, 495 (Bankr. D.N.D. 1984) (pursuant to an ordered stipulation of the parties, "[t]he payments required as adequate protection constituted an extension of the original installment contracts . . . ."); *In re Dabney*, 45 B.R. 312 (Bankr. E.D. Pa. 1985) ("Adequate protection may be provided, therefore, by the lessee's compliance with the provisions of the lease.").

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[15] In addition, if the Court were to ultimately hold that the County was entitled to deduct the items of expenses that it presently seeks to do, the County would be able to recoup such funds from future System Revenues. As such, compelling the County to transfer sufficient System Revenues in order to pay regularly scheduled Debt Service Payments results in no prejudice to the County.

25. In order to implement the foregoing relief, Syncora also requests that the County be required to permit the Indenture Trustee and other parties-in-interest access to, and rights of inspection of, the County's financial books and records as it relates to the System, System Revenues and Operating Expenses. This narrow request, which comports with similar relief provided by other courts, is necessary to ensure that the Debtor complies with its obligations regarding the payment of System Revenues and Operating Expenses pending a further determination of this Court on the issues. *See, e.g.*, *In re 5877 Poplar, L.P.*, 268 B.R. 140, 150 (Bankr. W.D. Tenn. 2001) (adequate protection included, *inter alia*, requirement that debtor turn over books and records and provide secured creditor with inspection rights); *In re Heatron, Inc.*, 6 B.R. 493, 496-97 (Bankr. W.D. Mo. 1980) (adequate protection included, *inter alia*, periodic financial and operational reporting).

B. Relief From the Automatic Stay

26. In the alternative, if Syncora's request for adequate protection is denied, Syncora requests relief from the automatic stay pursuant to 11 U.S.C. §§ 362(d)(1) ("Section 362(d)") and 922(d) ("Section 922(d)") so that it may return to state court to seek appropriate remedies based upon the County's defaults. Section 362(d)(1) of the Bankruptcy Code permits this Court to terminate the automatic stay imposed by Section 362(a) "for cause, including the lack of adequate protection of an interest in property of such party." 11 U.S.C. § 362(d); *see also In re Indian River Estates, Inc.*, 293 B.R. 429, 432-33 (Bankr. N.D. Ohio 2003); *In re Bushee*, 319 B.R. 542, 551 (Bankr. E.D. Tenn. 2004). "Cause," as applied under Section 362(d), is a "broad and flexible concept which permits a bankruptcy court, as a court of equity, to respond to inherently fact-sensitive situations." *Indian River*, 293 B.R. 433. In addition, Section 922(d) provides that "[n]otwithstanding section 362 of this title and subsection (a) of this section, a

petition filed under this chapter does not operate as a stay of application of pledged special revenues in a manner consistent with section [928] of this title to payment of indebtedness secured by such revenues." 11 U.S.C. § 922(d).

27. Cause exists to lift the stay here. If the Court denies its request for adequate protection, Syncora's interest will be unprotected and Syncora will be forced to bankroll the Debtor's unauthorized and unilateral decision to withhold System Revenues thereby resulting in the Indenture Trustee having insufficient funds to make regularly scheduled Debt Service Payments. Syncora's funding of these shortfalls will cause great prejudice to Syncora because it will have to seek reimbursement of funds it did not contract to fund, *i.e.*, funding shortfalls that arose because of a dispute regarding the Debtor's ability to modify the Indenture for the pledged System Revenues during the pendency of the chapter 9 case, not because of an actual revenue shortfall. Requiring Syncora to fund the Debtor's shortfalls is not only inequitable but may present very real consequences relating to Syncora's own viability and its ability to contribute to the resolution of the real issues at dispute in this case. Accordingly, the facts of this case weigh heavily in favor of granting Syncora relief from the stay.

28. In addition, the relief Syncora seeks here is relatively common. Courts often lift the stay pursuant to Section 362(d) in cases, like this one, where a party's interests are not protected and adequate protection is not provided. *See, e.g.*, *Equitable Life Assurance Soc'y v. James River Assocs. (In re James River Assocs.)*, 148 B.R. 790, 797 (E.D. Va. 1992), *appealed on other grounds*, 156 B.R. 494 (E.D. Va. 1993) ("A continued failure to make monthly payments under loan documents can constitute cause for granting relief from the automatic stay."); *In re Heritage Woods 'N Lake Estates, Inc.*, 73 B.R. 511, 513 (Bankr. M.D. Fla. 1987) (stating that "the Court finds that the Movants lack adequate protection" and granting relief from

the automatic stay under Section 362(d)(1)); *In re Woodbranch Energy Plaza One, Ltd.*, 44 B.R. 733, 737 (Bankr. S.D. Tex.) ("this Court concludes additionally that the automatic stay in this case should be lifted for cause, specifically including the lack of adequate protection . . . pursuant to § 362(d)(1).").

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V. CONCLUSION

WHEREFORE, for the foregoing reasons, Syncora respectfully requests that this Court enter an Order, substantially in the form attached hereto as Exhibit A, (i) providing Syncora with adequate protection in the form requested herein or, alternatively, (ii) lifting the automatic stay so that Syncora may pursue remedies in state court, and (iii) granting such other and further relief as this Court deems appropriate.

Dated: February 14, 2012
Birmingham, Alabama

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CERTIFICATE OF SERVICE

I hereby certify that the forgoing **Emergency Motion of Syncora Guarantee Inc. for Adequate Protection or, in the Alternative, Relief from the Automatic Stay** was filed and served via the Court's electronic case filing and noticing system to all parties registered to receive electronic notice in the this matter, and via electronic mail and U.S. mail first class prepaid as hereafter set forth this February 14, 2012.

/s/ Richard Carmody
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